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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1929

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 554

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the granting of the writ in this case.

The petition for certiorari presents several questions. The one of prime importance, a review of which by this Court would be justified in view of the divergence of opinion thereon, is whether a "consent in writing" waiving the period of limitations upon the assessment of taxes for the year 1914 is valid and effective within the meaning of Section 250 (d) of the Revenue Act of 1921, when such "consent in writing" was executed after the period of limitations had already expired.

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Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, so far as material, provides:

> The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

In *Joy Floral Co.* v. *Commissioner of Internal Revenue,* 29 F. (2d) 865, the Court of Appeals of

the District of Columbia held that a waiver executed after the limitation period had run failed to comply with the requirements of Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, which permits the later assessment of taxes where both the Commissioner and the taxpayer "have consented in writing." Although holding that the quoted words were "merely a paraphrase" of the word "consent," as used in Section 250 (d) of the Revenue Act of 1921, *supra*, the Court of Claims in the instant case refused to follow the decision of the Court of Appeals in the *Joy Floral Co. case* because it did not agree with the reasoning of the court in that case. (R. 35.) While the two cases are distinguishable on the facts, in that in the *Joy Floral Co. case* the taxpayer, in consenting to the waiver, was led into the mistaken belief that the period of limitations had not run by an erroneous statement in a letter received from the Deputy Commissioner of Internal Revenue, the Court of Appeals nevertheless came to the conclusion that the waiver was invalid irrespective of the element of mistake. The divergence of opinion between the two courts is therefore not avoided by the absence of that element in the instant case.

Many cases are now pending before the Bureau of Internal Revenue involving waivers executed after the running of the limitation periods. The disposition of these cases awaits an authoritative decision. The same question is also presented in the

following cases, now pending in Circuit Courts of Appeals: *Pictorial Printing Co.* v. *Commissioner of Internal Revenue* (C. C. A. 7th); *W. P. Brown & Sons Lumber Co. and Brown Brothers Land & Lumber Co.* v. *Commissioner of Internal Revenue* (C. C. A. 6th); *Heiner, Collector,* v. *Spear and Co.* (C. C. A. 3d).

Another question which arises in connection with the waiver in the instant case is whether it conferred upon the Commissioner of Internal Revenue power not only to *assess* but also to *collect* the tax after the expiration of the statutory period. Although apparently executed with the intention of complying with the provisions of Section 250 (d) of the Revenue Act of 1921, *supra,* which refers to the "later determination, assessment, and collection of the tax," the waiver expressly extended only the time for "assessment." (R. 25.) The Court of Claims held that "the parties evidently intended that the word 'assessment' should also cover the collection of the tax," as otherwise the execution of the waiver "was an idle performance." (R. 33.) A number of cases are pending in the Bureau of Internal Revenue in which this question is present, and a decision by this Court on this point is accordingly desirable.

We submit that the remaining questions presented in the instant case do not, of themselves, merit the consideration of this Court. Briefly, they relate to the transfer, by one corporation, to two

newly organized corporations, of certain assets out of the surplus of the transferor corporation, the value of which was credited on the books of the transferee corporations to the stockholders, who were the same in all three corporations. Appreciation in the value of corporate assets and earnings which accrued to the transferor corporation prior to March 1, 1913, were included in the surplus. There was no retirement of any part of the capital stock of the transferor. The stockholders withdrew a part of the amounts so credited, and received stock and debenture notes covering the balance. (R. 17–24.) Upon these facts, the Court of Claims held that the Commissioner properly taxed as a dividend to each stockholder his proportionate interest in the value of the assets so transferred and credited. (R. 29, 30.) The decision in this respect follows the views expressed by this Court in *Rockefeller* v. *United States,* 257 U. S. 176, and *Lynch* v. *Hornby,* 247 U. S. 339. The Court of Claims also held that the corporate distribution upon which the tax was imposed was not a gift (R. 31), and, further, that the tax should be based upon the fair value of the assets transfered, and not upon the value of the assets as shown upon the books of the donee corporation. (R. 31–32.)

While we do not oppose a review of the first two questions referred to herein, we submit that the decision of the Court of Claims on the other questions raised in the petition for certiorari was correct and

that they are not of sufficient importance to warrant consideration by this Court. We consequently suggest that if the Court decides to issue the writ, its review be limited to the questions involving the validity and effect of the waiver. (*Cf.* order of November 4, 1929, in *Danovitz* v. *United States*, No. 424, present term.)

Respectfully submitted.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE MOTION OF PETITIONER TO SET ASIDE PART OF LIMITATION OF ORDER GRANTING A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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On March 3, 1930, the Court granted the petition for a writ of certiorari to the Court of Claims in this cause—

> with the limitation, however, that counsel shall confine themselves, in the briefs and in oral argument, to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause.

The petitioner now seeks to have this Court revoke that part of its order restricting the scope of

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the briefs and the argument. The United States opposes this motion.

The arguments and contentions advanced by the petitioner in its motion have already been considered by the Court as they were fully presented in the petition for writ of certiorari and also in the petitioner's brief in support thereof. They were also discussed in the Government's brief filed in this Court.

The only issue of general importance in this case is the question of the validity of the waiver executed by the petitioner and the Commissioner of Internal Revenue extending the statutory period of limitation upon the assessment of the tax.

The motion of the petitioner should be denied.

Respectfully submitted.

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APRIL, 1930.

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